IEM SA v Flowbird Malaysia Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCVC)(W)-740–05 OF 2024 AND W-02(NCVC)(W)-741–05 OF 2024
SUPANG LIAN, LIM CHONG FONG AND ALWI ABDUL WAHAB JJCA
6 NOVEMBER 2025

Tort — Conspiracy to injure — Misuse of confidential information — Misuse of confidential information by former director of first company in favour of second company — First company's contract with third party was terminated and second company subsequently entered into contract with third party and successful in its bid in other projects — First company sued its former director and second company for breach of confidential information and breach of fiduciary duty — Whether judicial commissioner correct in holding that first company had established conspiracy to injure premised upon misuse of confidential information by its former director and second company — Whether there was concluded contract between first company and third party — Whether there was causal nexus between termination of contract with third party and loss suffered by first company — Whether judicial commissioner erred in assessing damages — Whether first company could suffer any loss in other projects when there was no proof that first company had bid for such other projects — Whether judicial commissioner was correct in holding that former director of first company had breached fiduciary duty by disclosing first company's confidential information to second company — Whether first company had pleaded elements of conspiracy to injure in its statement of claim — Evidence Act 1950 s 58

Flowbird Malaysia Sdn Bhd ('Flowbird') and IEM SA ('IEM') were companies which involved in the business of providing car parking solutions worldwide whilst Alain Taher Osterlind ('Alain') and Rafizuddin bin Ramly ('Rafizuddin') were initially Flowbird's directors. However, after meeting with the representatives of IEM in an event in Amsterdam, both Rafizuddin and Alain resigned from Flowbird and established SPS IEM Malaysia Sdn Bhd ('IEM Malaysia'). IEM on the other hand had established IEM Smart Parking Solutions Pte Ltd ('IEM Singapore'). The problem arose when Flowbird's contract with Harding Traffic ('Harding') for the car parking solutions project for the Rotorua Lakes Council in New Zealand was terminated and such contract was later awarded to IEM. In addition, IEM was successful in its bid for car parking solutions projects in Makassar, Indonesia. Aggrieved with the situation, Flowbird filed an action against IEM, Rafizuddin and Alain ('the defendants') for breach of confidential information and breach of fiduciary duty and claimed for, inter alia: (a) injunctive relief, ie, for the defendants to

cease doing any business similar to or in competition with Flowbird's business and for the defendants to cease the use of and return all confidential information belonging to Flowbird; (b) damages amounting to USD253,321.30 as a result of the termination by Harding; (c) an account of projects and/or bids won and/or participated in in respect of parking solutions in the Asia Pacific region; (d) general damages; (e) a declaration that Alain and Rafizuddin had contravened their duties as directors; and (f) costs. Alain failed to enter appearance in the suit, as such, Flowbird obtained certificate of non-appearance against him. At the end of the trial, the learned judicial commissioner ('the JC') found in favour of Flowbird, hence, the present appeals by Rafizuddin and IEM ('the appellants'). In relation to the contract between Flowbird and Harding, the appellants submitted that: (i) there was no concluded contract between them; (ii) even if there was a concluded contract, its termination was due to Harding's dissatisfaction with Flowbird's performance; (iii) there was no contemporaneous proof of IEM using Flowbird's confidential information to secure the contract with Harding; and (iv) there was no causal nexus between the alleged termination of the contract and the loss and damage purportedly suffered by Flowbird amounting to USD253,321.30. In respect of the Makassar project in Indonesia, the appellants contended that it was IEM Malaysia, and not IEM, that secured the bid. Moreover, there was no proof that Flowbird had bid for that project, hence, Flowbird could not have suffered any loss or damage. Lastly, IEM contended that Flowbird failed to plead the elements of conspiracy to injure in its statement of claim.

Held, allowing the appeals in part by varying the award of damages to USD51,610, affirming the remainder of the High Court's judgment, and ordering the parties to bear their respective costs for both appeals:

(1) It was trite law that the function of the appellate court was merely that of review. Upon review, the court found that the challenges mounted by IEM and Rafizuddin were predominantly directed against the factual findings accepted by the JC. Generally, such findings were unassailable unless they were baseless, misconceived, or misunderstood. Be that as it may, it was trite that the standard of proof for a plaintiff in a claim for conspiracy to injure premised on misuse of confidential information was the civil standard, not the criminal standard (see paras 30 & 37–38).

(2) Based on the correspondence between Flowbird and Harding, the court found that there indeed existed a contractual relationship between them. Further, it was statement of agreed facts between the parties that Flowbird's services were previously engaged by Harding, which arrangement was subsequently terminated. IEM was plainly bound by its admission made in the statement of agreed facts, pursuant to s 58 of the Evidence Act 1950 and the principle in *Naza Motor Trading Sdn Bhd v Malaysian Motor Insurance Pool (formerly known as HRMIP)*

(administered by Malaysian National Reinsurance Bhd) [2011] 2 MLJ 597 (CA) applied (see paras 39–40).

(3) The court was satisfied that IEM through the facilitation of Alain and/or Rafizuddin during their meetings and correspondence in March to April 2018 had access to extracts of the agreement between Flowbird and Harding, as well as to price quotations, budgets, and spreadsheets reflecting Flowbird's contractual performance with Harding. The JC was not plainly wrong in concluding that it was more probable that IEM succeeded in obtaining the contract from Harding after having knowledge of Flowbird's quotation and discounts offered to Harding. No witness from Harding was called at trial to testify on the reasons for the termination, as such, the JC was entitled to draw the necessary inferences from the testimonial and documentary evidence as well as circumstantial evidence. It was unnecessary for Flowbird to reconstruct with exactitude every event constituting the conspiracy. The JC had correctly held that 'it is evident that the timing of all these events clearly indicates that the complaints as raised by the plaintiff were not coincidences. Ultimately, the plaintiff suffered losses as a result of these incidents ...' and made the adverse finding against IEM including on the termination of the Harding contract based on the totality of the evidence produced in court (see paras 41 & 43–44).

(4) The applicable standard of proof was not beyond reasonable doubt, but on a balance of probabilities. Flowbird had sufficiently discharged this burden in establishing a conspiracy to injure premised upon the misuse of confidential information by IEM, Alain, and Rafizuddin. Consequently, the court was satisfied that the termination of the contract with Harding had resulted in loss and damage to Flowbird in relation to the Rotorua Lakes Council project. The requisite elements of the tort, as set out in *Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and another appeal* [2016] 3 MLJ 797 (CA) had been met, and the court found no basis to conclude that the JC was plainly wrong (see para 45).

(5) The court found that Flowbird may only recover its loss of profit arising from the terminated contract. This should be computed as the difference between the sales turnover and the cost of sales. Based on Flowbird's own spreadsheet, this could at most amount to EUR45,255 (approximately USD51,610). Accordingly, the court found that the JC erred in assessing damages at USD253,321.30. The award ought therefore to be varied and reduced to USD51,610 (see paras 47–48).

(6) The Makassar project was secured through the assistance of Alain and Rafizuddin, who shared Flowbird's quotations with IEM, and through the involvement of one Rizal, a Flowbird contact in Makassar. The court also noted that several newspaper articles mentioned Alain's active role in the project. The court therefore found that the JC was not plainly wrong

in holding that IEM, together with Alain and/or Rafizuddin, conspired to injure Flowbird by misusing its confidential information. The fact that Flowbird did not itself submit a bid for the Makassar project was of no consequence (see paras 50–51).

(7) The court found no error in the JC's conclusion that IEM Malaysia and IEM Singapore were part of a corporate structure established by IEM in furtherance of the conspiracy to injure Flowbird. The evidence showed that they acted in concert at all material times. Although IEM maintained that IEM Malaysia had secured the contract, the evidence adduced by Flowbird pointed to IEM Malaysia merely bidding for it, with no contrary evidence showing that it executed the contract. The JC was therefore not plainly wrong in concluding that the contract was in substance with IEM. In the premises, the JC had correctly ordered general damages to be assessed, or alternatively, an account to be taken in respect of the Makassar project, arising from the misuse of confidential information, notwithstanding that Flowbird neither bid for nor secured the project (see paras 52–53).

(8) The court was satisfied that the JC correctly held that Alain and Rafizuddin were separately liable to Flowbird for breach of fiduciary duties as directors, having acted contrary to Flowbird's interests by disclosing its confidential information to IEM between March and April 2018 (see para 54).

(9) As regards IEM's contention that Flowbird failed to plead the elements of conspiracy to injure in its statement of claim, the court found upon review that the material facts were sufficiently pleaded to support the claim for unlawful conspiracy. IEM was not misled in any way. In any event, IEM could have sought further and better particulars if clarification was required. There was therefore no merit in the ground of appeal alleging deficiency in Flowbird's pleadings (see paras 55–56).

[Bahasa Malaysia summary

Flowbird Malaysia Sdn Bhd ('Flowbird') dan IEM SA ('IEM') merupakan syarikat-syarikat yang terlibat dalam perniagaan menyediakan penyelesaian tempat letak kereta di seluruh dunia manakala Alain Taher Osterlind ('Alain') dan Rafizuddin bin Ramly ('Rafizuddin') pada mulanya merupakan pengarah-pengarah Flowbird. Walau bagaimanapun, selepas bertemu dengan wakil-wakil IEM dalam satu acara di Amsterdam, Rafizuddin dan Alain meletak jawatan daripada Flowbird dan menubuhkan SPS IEM Malaysia Sdn Bhd ('IEM Malaysia'). IEM pula telah menubuhkan IEM Smart Parking Solutions Pte Ltd ('IEM Singapura'). Masalah timbul apabila kontrak Flowbird dengan Harding Traffic ('Harding') untuk projek penyelesaian tempat letak kereta untuk Rotorua Lakes Council di New Zealand ditamatkan dan kontrak tersebut kemudiannya diberikan kepada IEM. Di samping itu,

IEM juga berjaya dalam bidaannya untuk projek penyelesaian tempat letak kereta di Makassar, Indonesia. Terkilan dengan situasi tersebut, Flowbird memfailkan tindakan terhadap IEM, Rafizuddin dan Alain ('defendan-defendan') atas pelanggaran maklumat sulit dan pelanggaran tanggungjawab fidusiari dan menuntut, antara lain: (a) relif injunksi, iaitu, agar defendan-defendan berhenti menjalankan apa-apa perniagaan yang serupa atau bersaing dengan perniagaan Flowbird dan agar defendan-defendan berhenti menggunakan dan mengembalikan semua maklumat sulit milik Flowbird; (b) ganti rugi berjumlah USD253,321.30 akibat penamatan kontrak oleh Harding; (c) akaun projek dan/atau bidaan yang dimenangi dan/atau disertai berkenaan penyelesaian tempat letak kereta di rantau Asia Pasifik; (d) ganti rugi am; (e) pengisytiharan bahawa Alain dan Rafizuddin telah melanggar tanggungjawab mereka sebagai pengarah; dan (f) kos. Alain gagal hadir dalam saman tersebut, oleh itu, Flowbird memperoleh perakuan ketidakhadiran terhadapnya. Pada akhir perbicaraan, pesuruhjaya kehakiman yang bijaksana ('PK') membuat keputusan yang memihak kepada Flowbird, justeru, Rafizuddin dan IEM ('perayu-perayu') memfailkan rayuan-rayuan semasa. Berhubung dengan kontrak antara Flowbird dan Harding, perayu-perayu berhujah bahawa: (i) tiada kontrak yang dimuktamadkan antara mereka; (ii) walaupun terdapat kontrak yang dimuktamadkan, penamatannya adalah disebabkan oleh ketidakpuasan hati Harding terhadap prestasi Flowbird; (iii) tiada keterangan sezaman yang menunjukkan IEM menggunakan maklumat sulit Flowbird untuk mendapatkan kontrak dengan Harding; dan (iv) tiada hubungan kausal antara dakwaan penamatan kontrak tersebut dan kehilangan dan kerugian yang didakwa dialami oleh Flowbird berjumlah USD253,321.30. Berkenaan dengan projek Makassar di Indonesia, perayu-perayu berhujah bahawa IEM Malaysia, dan bukan IEM, yang mendapatkan bidaan tersebut. Selain itu, tiada bukti bahawa Flowbird telah membida untuk projek tersebut, justeru, Flowbird tidak mungkin mengalami apa-apa kehilangan atau kerugian. Akhir sekali, IEM berhujah bahawa Flowbird gagal memplidkan elemen-elemen konspirasi untuk mencederakan dalam pernyataan tuntutannya.

Diputuskan, membenarkan sebahagian daripada rayuan-rayuan dengan mengubah pemberian ganti rugi kepada USD51,610, mengesahkan baki penghakiman Mahkamah Tinggi, dan memerintahkan pihak-pihak menanggung kos masing-masing untuk kedua-dua rayuan:

(1) Sudah menjadi undang-undang yang mantap bahawa fungsi mahkamah rayuan hanyalah semakan. Setelah semakan, mahkamah mendapati bahawa cabaran yang dikemukakan oleh IEM dan Rafizuddin kebanyakannya ditujukan terhadap dapatan-dapatan fakta yang diterima oleh PK. Secara amnya, dapatan-dapatan sedemikian tidak boleh dipertikaikan melainkan ia tidak berasas, disalahertikan, atau disalah tanggap. Walau bagaimanapun, adalah jelas bahawa standard

pembuktian bagi plaintif dalam tuntutan konspirasi untuk mencederakan yang berasaskan penyalahgunaan maklumat sulit adalah standard sivil, bukan standard jenayah (lihat perenggan 30 & 37–38).

(2) Berdasarkan surat-menyurat antara Flowbird dan Harding, mahkamah mendapati bahawa memang wujud hubungan kontraktual antara mereka. Tambahan pula, terdapat pernyataan fakta yang dipersetujui antara pihak-pihak bahawa Harding yang telah mendapatkan perkhidmatan Flowbird sebelum ini, yang mana pengaturan tersebut kemudiannya ditamatkan. IEM jelas terikat dengan pengakuannya yang dibuat dalam pernyataan fakta yang dipersetujui, menurut s 58 Akta Keterangan 1950 dan prinsip dalam *Naza Motor Trading Sdn Bhd v Malaysian Motor Insurance Pool (formerly known as HRMIP) (administered by Malaysian National Reinsurance Bhd)* [2011] 2 MLJ 597 (MR) yang terpakai (lihat perenggan 39–40).

(3) Mahkamah berpuas hati bahawa IEM melalui bantuan Alain dan/atau Rafizuddin semasa mesyuarat dan surat-menyurat mereka pada Mac hingga April 2018 mempunyai akses kepada petikan perjanjian antara Flowbird dan Harding, serta sebut harga, bajet dan lembaran hamparan yang mencerminkan pelaksanaan kontrak Flowbird dengan Harding. Pesuruhjaya kehakiman tidak salah sama sekali dalam membuat kesimpulan bahawa IEM lebih berkemungkinan berjaya mendapatkan kontrak daripada Harding selepas mengetahui sebut harga dan diskaun Flowbird yang ditawarkan kepada Harding. Tiada saksi daripada Harding dipanggil semasa perbicaraan untuk memberi keterangan tentang sebab-sebab penamatan tersebut, oleh itu, PK berhak untuk membuat inferens yang diperlukan daripada keterangan testimoni dan dokumentar serta keterangan mengikut keadaan. Flowbird tidak perlu membina semula dengan tepat setiap peristiwa yang membentuk konspirasi tersebut. Pesuruhjaya kehakiman telah memutuskan dengan betul bahawa 'it is evident that the timing of all these events clearly indicates that the complaints as raised by the plaintiff were not coincidences. Ultimately, the plaintiff suffered losses as a result of these incidents ...' dan membuat dapatan bertentangan terhadap IEM termasuk berkenaan penamatan kontrak Harding tersebut berdasarkan keseluruhan keterangan yang dikemukakan di mahkamah (lihat perenggan 41 & 43–44).

(4) Standard pembuktian yang terpakai bukanlah melampaui keraguan munasabah, tetapi di atas imbangan kebarangkalian. Flowbird telah melepaskan beban ini dengan secukupnya dalam membuktikan konspirasi untuk mencederakan yang berasaskan penyalahgunaan maklumat sulit oleh IEM, Alain, dan Rafizuddin. Akibatnya, mahkamah berpuas hati bahawa penamatan kontrak dengan Harding telah mengakibatkan kehilangan dan kerugian kepada Flowbird berhubung

projek Rotorua Lakes Council. Elemen-elemen tort yang diperlukan, seperti yang dinyatakan dalam *Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and another appeal* [2016] 3 MLJ 797 (MR) telah dipenuhi, dan mahkamah tidak menemui asas untuk membuat kesimpulan bahawa PK adalah jelas salah (lihat perenggan 45).

(5) Mahkamah mendapati bahawa Flowbird hanya boleh mendapatkan semula kerugian keuntungannya yang timbul daripada kontrak yang ditamatkan. Jumlah ini boleh didapati dengan mengira perbezaan antara perolehan jualan dan kos jualan. Berdasarkan lembaran hamparan Flowbird sendiri, jumlah maksimumnya hanyalah EUR45,255 (kira-kira USD51,610). Sehubungan itu, mahkamah mendapati bahawa PK telah terkhilaf dalam menilai ganti rugi sebanyak USD253,321.30. Oleh itu, award tersebut harus diubah dan dikurangkan kepada USD51,610 (lihat perenggan 47–48).

(6) Projek Makassar tersebut telah diperoleh melalui bantuan Alain dan Rafizuddin, yang berkongsi sebut harga Flowbird dengan IEM, dan melalui penglibatan Rizal, seorang kenalan Flowbird di Makassar. Mahkamah juga mengambil perhatian bahawa beberapa artikel akhbar menyebut peranan aktif Alain dalam projek tersebut. Oleh itu, mahkamah mendapati bahawa PK tidak salah sama sekali dalam memutuskan bahawa IEM, bersama-sama Alain dan/atau Rafizuddin, berkonspirasi untuk mencederakan Flowbird dengan menyalahgunakan maklumat sulitnya. Hakikat bahawa Flowbird sendiri tidak mengemukakan bidaan untuk projek Makassar tersebut adalah tidak penting (lihat perenggan 50–51).

(7) Mahkamah tidak menemui apa-apa kekhilafan dalam kesimpulan PK bahawa IEM Malaysia dan IEM Singapura adalah sebahagian daripada struktur korporat yang ditubuhkan oleh IEM bagi menjayakan konspirasi untuk mencederakan Flowbird. Keterangan menunjukkan bahawa mereka bertindak secara bersama pada setiap masa yang penting. Walaupun IEM menegaskan bahawa IEM Malaysia yang telah memperoleh kontrak tersebut, keterangan yang dikemukakan oleh Flowbird menunjukkan bahawa IEM Malaysia hanya membidanya, tanpa apa-apa keterangan sebaliknya yang menunjukkan bahawa ia telah melaksanakan kontrak tersebut. Oleh itu, PK tidak salah sama sekali dalam membuat kesimpulan bahawa kontrak tersebut pada hakikatnya dibuat dengan IEM. Berdasarkan dapatan tersebut, PK telah memerintahkan dengan betul agar ganti rugi am ditaksir, atau secara alternatif, akaun perlu diambil berkenaan projek Makassar tersebut, yang timbul daripada penyalahgunaan maklumat sulit, walaupun Flowbird tidak membida mahupun memperoleh projek tersebut (lihat perenggan 52–53).

(8) Mahkamah berpuas hati bahawa PK telah memutuskan dengan betul

bahawa Alain dan Rafizuddin bertanggungjawab secara berasingan kepada Flowbird atas pelanggaran tanggungjawab fidusiari sebagai pengarah, setelah bertindak bertentangan dengan kepentingan Flowbird dengan mendedahkan maklumat sulitnya kepada IEM antara Mac dan April 2018 (lihat perenggan 54).

(9) Berkenaan dengan hujah IEM bahawa Flowbird gagal memplidkan elemen-elemen konspirasi untuk mencederakan dalam pernyataan tuntutannya, setelah menyemak, mahkamah mendapati bahawa fakta-fakta penting telah dikemukakan dengan secukupnya untuk menyokong tuntutan konspirasi yang menyalahi undang-undang. IEM tidak dikelabui dalam apa jua cara. Walau apa pun, IEM boleh memohon untuk mendapatkan butiran lanjut dan lebih baik jika penjelasan diperlukan. Oleh itu, tiada merit dalam alasan rayuan yang mendakwa kecacatan dalam pliding Flowbird (lihat perenggan 55–56).]

Cases referred to

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)

Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and another appeal [2016] 3 MLJ 797; [2016] 3 CLJ 676, CA (refd)

Flowbird Malaysia Sdn Bhd v Alain Taher Osterlind & Ors [2024] 11 MLJ 235; [2024] 10 CLJ 432, HC (refd)

Golden Affinity Development Sdn Bhd (in liquidation) v Lim Yok Wah & Ors and another case [2023] 11 MLJ 581, HC (distd)

Khalek bin Awang & Anor v Koperasi Perumahan Kluang Bhd and another appeal [2021] 5 MLJ 435, CA (refd)

Naza Motor Trading Sdn Bhd v Malaysian Motor Insurance Pool (formerly known as HRMIP) (administered by Malaysian National Reinsurance Bhd) [2011] 2 MLJ 597, CA (folld)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)

Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd [2012] 4 MLJ 149; [2012] 1 LNS 1416, CA (refd)

Poteck Enterprise Sdn Bhd v Richallenge Corp Sdn Bhd [2025] 6 MLJ 886; [2025] 5 MLRA 836, CA (refd)

Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394; [2010] 5 CLJ 32, CA (distd)

Ho Tack Sien & Ors v Rotta Research Laboratorium SpA & Anor (Registrar of Trade Marks, intervener) [2015] 4 MLJ 166, HC (refd)

Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777, FC (refd)

Tresenergy Sdn Bhd v Mohd Fauzi bin Ya'akob & Anor [2021] 7 MLJ 419, HC (distd)

Legislation referred to

Evidence Act 1950 s 58

Appeal from: *Flowbird Malaysia Sdn Bhd v Alain Taher Osterlind & Ors* [2024] 11 MLJ 235 (High Court, Kuala Lumpur)

Lee Shih (with Lee Suan Cui) (Lim Chee Wee Partnership) in Civil Appeal No W-02(NCVC)(W)-740–05 of 2024 for the appellant.

Nur Afiqah bt Mohd Ashriee (with Siti Nur Athirazatti Rohizad and Nur Sabreena Jazzmyn Melody bt Mohd Hassan Ali Abdullah) (Saiful, Roger & Co) in Civil Appeal No W-02(NCVC)(W)-741–05 of 2024 for the appellant.

K Shanti Mogan (with Yiew De Quan) (Shearn Delamore & Co) in Civil Appeal Nos W-02(NCVC)(W)-740–05 of 2024 and W-02(NCVC)(W)-741–05 of 2024) for the respondent.

Lim Chong Fong JCA:

INTRODUCTION

[1] These are two related appeals involving allegations of breach of confidential information and breach of fiduciary duty.

[2] The appellant in Appeal No 740 is a company incorporated in Switzerland and was the third defendant in the High Court proceedings below.

[3] The appellant in Appeal No 741 is a Malaysian individual and was the second defendant in the High Court below.

[4] The respondent in both Appeal No 740 and Appeal No 741 ('the appeals') is a company incorporated in Malaysia and was the plaintiff in the High Court below.

[5] For convenience, the parties will hereinafter be referred to as IEM, Rafizuddin, and Flowbird respectively.

[6] The appeals were heard on 23 June 2025, whereupon this court *curia advisari vult* to deliberate on the submissions and contentions advanced by the parties.

[7] Having now duly considered the same, we deliver herewith our decision together with the supporting grounds.

A BACKGROUND

[8] Flowbird was formerly known as Cale Malaysia Sdn Bhd, following a merger between Parkeon SAS and Cale Group AB. It forms part of the Flowbird group of companies with its headquarters based in France. Flowbird is engaged in the business of providing car parking solutions worldwide, including to Harding Traffic Ltd ('Harding') in New Zealand.

[9] Rafizuddin and Alain Taher Osterlind, the first defendant ('Alain') in the High Court below, were former employees of Flowbird.

[10] IEM is a company based in Switzerland and is likewise involved in the business of providing car parking solutions.

[11] Between 20 and 23 March 2018, Alain and Rafizuddin met representatives of IEM at IEM's exhibition booth during the Intertraffic event held in Amsterdam, the Netherlands.

[12] Subsequently, in April 2018, IEM's Chief Executive Officer, Philippe Menoud, received emails from Alain and Rafizuddin containing, inter alia, information belonging to Flowbird. Both Alain and Rafizuddin thereafter met with IEM's representatives in Geneva, Switzerland, from 2 to 5 May 2018.

[13] IEM established IEM Smart Parking Solutions Pte Ltd ('IEM Singapore') on 21 June 2018.

[14] Alain and Rafizuddin tendered their resignations from Flowbird on 9 June 2018. Alain ceased to be a director on 1 July 2018, while Rafizuddin ceased on 31 August 2018.

[15] Subsequently, both of them established SPS IEM Malaysia Sdn Bhd ('IEM Malaysia') on 21 February 2019 and became its directors. IEM Malaysia is a separate and distinct legal entity from IEM.

[16] Upon its incorporation, IEM Malaysia participated in project bids for car parking solutions in Kuala Terengganu, Malaysia, and Makassar, Indonesia, while IEM participated in a similar project in Rotorua, New Zealand.

[17] On 13 August 2018, the contract between Flowbird and Harding for the car parking solutions project for the Rotorua Lakes Council in New Zealand was terminated. IEM thereafter supplied parts and provided car parking solutions to the Rotorua Lakes Council.

[18] Subsequently, in September 2018, IEM was successful in its bid for the car parking solutions project in Makassar, Indonesia.

[19] As for the car parking solutions project in Kuala Terengganu, IEM Malaysia participated in the bid in March 2019, but the project was ultimately awarded to Flowbird.

[20] At the request of IEM, IEM Malaysia was later dissolved on 14 October 2019.

[21] Consequently, by its solicitors' letter dated 28 November 2019, Flowbird demanded that IEM cease the use of and return all confidential information belonging to Flowbird, and account for all monies, contacts, and benefits derived from the use of such information.

[22] IEM's solicitors responded by letter dated 11 December 2019, denying Flowbird's allegations.

[23] As a result, on 3 April 2020, Flowbird instituted Kuala Lumpur High Court Suit No WA-22NCvC-197–04 of 2020 ('the suit') against Alain, Rafizuddin, and IEM.

IN THE HIGH COURT

[24] Flowbird claimed the following reliefs against Alain, Rafizuddin, and IEM:

43. Against the Defendants jointly and/or severally:

(a) injunctive relief and/or orders against the Defendants for the following:

(i) for the Defendants to cease doing any business similar to or in competition with the business of Flowbird that is clearly developed upon the confidential information supplied to the 1st and 2nd Defendants during their employ with Flowbird and/or taken by the 1st and 2nd Defendants without authorization whilst *in Flowbird's employ and/or disclosed by the* 1st and 2nd *Defendants to Flowbird's competitors during their employ with* Flowbird; and

(ii) for the Defendants to cease the use of and return all confidential information belonging to Flowbird in any form whatsoever eg documentation, computer disc, etc.

(b) damages amounting to USD253,321.30 as a result of the termination by Harding Traffic;

(c) an account of projects and/or bids won and/or participated in in respect of parking solutions in the Asia Pacific region;

(d) general damages;

(e) a declaration that the 1st and 2nd Defendants have contravened their duties as directors, entitling an application by the Registrar to disqualify the 1st and 2nd Defendants from acting or holding office as director in respect of Malaysian companies;

(f) costs; and

(g) such further and/or other relief which this Honourable Court deems fit and proper.

[25] Alain did not enter an appearance in the suit, and Flowbird accordingly obtained a certificate of non-appearance against him.

[26] Following the trial against Rafizuddin and IEM, the learned judicial commissioner, on 1 April 2024, found in favour of Flowbird and entered judgment in the suit as follows ('judgment'):

1. An injunction is granted against the Defendants, for the Defendants to cease the use of and return, all confidential information belonging to the Plaintiff in any form whatsoever eg documentation, computer disc, etc.;
2. The Defendants to, on a joint and several basis, pay damages in the sum of USD251,321.30 to the Plaintiff as a result of the termination by Harding Traffic Ltd;
3. The Defendants to, on a joint and several basis, provide an account of the project in Makassar, Indonesia;
4. The Defendants to, on a joint and several basis, pay general damages to the Plaintiff, in respect of the project in Makassar, Indonesia;
5. A declaration that the 1st and 2nd Defendants have contravened their duties as directors;
6. Interest on the judgment sum USD251,321.30 at a rate of 5% per annum from the date of the Judgment (ie 1.4.2024) until full and final settlement;
7. Interest on the judgment sum pursuant to paragraph 4 above at a rate of 5% per annum from the date of the Judgment (ie 1.4.2024) until full and final settlement;
8. Costs of RM30,000.00 paid by the 2nd Defendant to the Plaintiff; and
9. Costs of RM30,000.00 paid by the 3rd Defendant to the Plaintiff.

[27] The learned judicial commissioner held as follows based on excerpts reproduced from the grounds of judgment reported in *Flowbird Malaysia Sdn Bhd v Alain Taher Osterlind & Ors* [2024] 11 MLJ 235; [2024] 10 CLJ 432:

[18] My first step in this process is to be convinced, on a balance of probabilities, that confidential information exists in the circumstances of the case. Secondly, I

must be satisfied that the information was communicated to another unconnected third party and, thirdly, that the information was used unauthorisedly to harm the owner.

[19] As a means of providing self-guidance, what constitutes confidential information? In *Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon* [2010] 8 MLJ 297; [2010] CLJU 444; [2010] 1 LNS 444, His Lordship Abdul Malik Ishak J (as His Lordship then was) explained that confidential information would also include information concerning customers, cost prices, as well as customers' specific needs and requirements. According to His Lordship at p 332:

> [83] All these authorities serve as good guidelines in adjudicating this case. It must be borne in mind that confidential information would also cover information relating to customers, cost prices together with the specific needs and requirements of customers. In the present case, the defendant had access to all these and he did not deny them. The irresistible inference can be drawn that the defendant was guilty of revealing and utilising the confidential secrets of the plaintiff when the defendant joined Alpha. What the defendant did would certainly amount to breaching ell 8 and 9 of the letter of offer in exh P1.

...

[21] Having identified the above, what are the elements of a claim based on a breach of confidence or disclosure of confidential information? Megarry J stated the following at pp 47–48 in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41:

> In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, MR in the Saltman case on page 215, must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it. I must briefly examine each of these requirements in turn.
>
> First, the information must be of a confidential nature. As Lord Greene said in the Saltman case at page 215, 'something which is public property and public knowledge' cannot per se provide any foundation for proceedings for breach of confidence. However confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is already common knowledge. But this must not be taken too far. Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality: for something new and confidential may have been brought into being by the application of the skill and ingenuity of the human brain. Novelty depends on the thing itself, and not upon the quality of its constituent parts. Indeed, often the more striking the novelty, the more commonplace its components. Mr Mowbray demurs to the concept that some degree of originality is requisite. But whether it is described as originality or novelty or ingenuity or otherwise, I think there must be some product of the human brain which suffices to confer a confidential nature upon the

information: and, expressed in those terms, I think that Mr Mowbray accepts the concept.

The difficulty comes, as Lord Denning, MR pointed out in the Seager case on page 931, when the information used is partly public and partly private; for then the recipient must somehow segregate the two and, although free to use the former, must take no advantage of the communication of the latter. To this subject I must in due course return. I must also return to a further point, namely, that where confidential information is communicated in circumstances of confidence the obligation thus created endures, perhaps in a modified form, even after all the information has been published or is ascertainable by the public; for the recipient must not use the communication as a spring-board (see the *Seager* case, pages 931 and 933). I should add that, as shown by *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 WLR 1293; [1966] RPC 81, the mere simplicity of an idea does not prevent it being confidential (see pages 1309 and 1310). Indeed, the simpler an idea, the more likely it is to need protection.

The second requirement is that the information must have been communicated in circumstances importing an obligation of confidence. However secret and confidential the information, there can be no binding obligation of confidence if that information is blurted out in public or is communicated in other circumstances which negative any duty of holding it confidential. From the authorities cited to me, I have not been able to derive any very precise idea of what test is to be applied in determining whether the circumstances import an obligation of confidence. In the *Argyll* case at page 330, Ungoed-Thomas, J concluded his discussion of the circumstances in which the publication of marital communications should be restrained as being confidential by saying, 'If this was a well-developed jurisdiction doubtless there would be guides and tests to aid in exercising it'. In the absence of such guides or tests the then in effect concluded that part of the communications there in question would on any reasonable test emerge as confidential. It may be that that hard-worked creature, the reasonable man, may be pressed into service once more; for I do not see why he should not labour in equity as well as at law. It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence. In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence: see the *Saltman* case at page 216. On that footing, for reasons that will appear, I do not think I need explore this head further. I merely add that I doubt whether equity would intervene unless the circumstances are of sufficient gravity; equity ought not to be invoked merely to protect trivial tittle-tattle, however confidential.

Thirdly, there must be an unauthorised use of the information to the detriment of the person communicating it. Some of the statements of principle in the cases omit any mention of detriment; other include it. At first sight, it seems that

detriment ought to be present if equity is to be induced to intervene; but I can conceive of cases where a plaintiff might have substantial motives for seeking the aid of equity and yet suffer nothing which could fairly be called detriment to him, as when the confidential information shows him in a favourable light but gravely injures some relation or friend of his whom he wishes to protect. The point does not arise for decision in this case, for detriment to the plaintiff plainly exists. I need therefore say no more than that although for the purposes of this case I have stated the propositions in the stricter form, I wish to keep open the possibility of the true proposition being that in the wider form.

[22] A summary of the elements identified by Megarry J can be found below;

(a) that the information was of a confidential nature;

(b) that it was communicated in circumstances importing an obligation of confidence; and

(c) that there was an unauthorised use of the information to the detriment of the owner of such information.

...

[24] Taking a closer look at the facts at hand, in determining whether confidential information exists, I need to examine the evidence presented by the parties. With regard to this, it all began when the first defendant and the second defendant ('DW1') travelled to Amsterdam in March 2018 to represent the plaintiff at an international event called Intertraffic. I would like to highlight at this point that the event involved not only networking sessions and exhibitions on the newest trends and developments in smart mobility, parking and traffic management from the perspective of the traffic technology industry but also a networking event where traffic technology professionals from all over the world could share ideas and make connections.

[25] It is rather cliche to say that one thing always leads to another. In this sense, one business networking session led to another. This is what happened in this case. The first and second defendants met with Philippe Menoud ('DW2'), the third defendant's Chief Executive Officer and Board member, along with Francois Menoud, the third defendant's Chief Technology Officer.

[26] Following such a meeting, barely a month after the first and second defendants encountered the gentlemen from the third defendant, the first defendant began sending emails to DW2 with carbon copies to the second defendant and Francois Menoud, totaling eight emails. Some of the information contained in these emails related to the plaintiff's business operations, the group's strategy, projects, market analysis, pricing, payment terms, discounts and machine specifications related to the plaintiff's clients, its performance in Asia and the expansion plan.

...

[28] After reviewing those emails and the supporting documents, it is my opinion that based on their nature and characters and in light of the above case law, which supports the assertion that similar information contained in the emails is confidential in nature and effect, they undoubtedly contain confidential

information that was later communicated to the third defendant without the plaintiff's permission.

[29] As further proof of this issue, DW2 acknowledged this fact when he thanked the first defendant for providing 'confidential information' in his reply email. In addition, it is worth noting that there is no real dispute between the second and third defendants, who only advanced bare assertions that the confidential information could be found online.

[30] Moreover, the second defendant also admitted under cross-examination that some of the documents obtained were confidential and could not be accessed online. Further, he acknowledged that the emails sent on 17 and 18 April 2018 contained confidential information that should not be disclosed to the third defendant since they contained details that would allow the third defendant to determine the amount of sales made by the plaintiff, the prices offered, the machine specifications required and other terms of business and marketing offered by the plaintiff. It was also admitted by the second defendant that he had an obligation to inform the plaintiff that confidential information was being passed on to a competitor, but failed to do so. This was the most significant evidence from the second defendant. On top of that, the second defendant did nothing to oppose to dissemination of such information.

[31] With respect to the issue of publicly available documents, it seems to me that the second and third defendants' claim that those materials involve publicly available information and would be available online does not hold water in light of the glaring evidence available in this dispute. While the plaintiff's business nature and the projects in which it participated could have been made public, some of the information provided through those emails could not be obtained through that means. Both the second defendant and DW2 have also sufficiently agreed with this proposition.

[32] Additionally, I find that there are no sufficient materials before me to demonstrate that such publicly available documents and information are accessible online. It appears to me that the second defendant and DW2 seem to agree on this. As a result, they have failed to establish that the documents could be obtained through the public domain.

[33] My attention is further drawn to another important factor involving the third defendant's position. It appears that the third defendant, through the testimony of DW2, was aware of the fact that the emails sent by the first and/or second defendants were not authorised by the plaintiff. In this regard, DW2's admission that he would not have allowed the third defendant's employees to share the same information with others and his admission in his witness statement that the third defendant had considered the first and second defendant's employment contracts after the meeting in May 2018 would add additional suspicious elements to his conduct. Taken together, the events and the defendants' conduct reveal a suspicious connection. As it was in this case, the third defendant would not condone the same thing if it involved its own property. In the same way, the plaintiff would not expect its property to be shared with strangers, much less a competitor, by its own internal parties.

[34] Additionally, I conclude that it is an agreed upon fact between the plaintiff and the second defendant that the third defendant obtained those emails after they had been supplied to the third defendant by the first defendant, to the full knowledge and participation of the second defendant, while they were employees of the plaintiff and also its directors. As indicated above, there is clear evidence before me that confidential information was made available to the third defendant.

[35] In my analysis of the above factual circumstances and combining several instances to arrive at a solid justification, I conclude that the third defendant is, without a doubt, the recipient of the plaintiff's confidential information with notice that it was confidential when it obtained that information and materials from the first and second defendants, and not merely from other publicly available sources as claimed by them. Instead of disregarding the information and data, the third defendant clearly took advantage of it and gained benefits that it would not have been able to obtain without the first and second defendants' involvement. Thus, the third defendant is no longer considered a bona fide party who was unaware of the nature of the confidential information that they received. In this instance, I would not have found in favour of the plaintiff if there hadn't been the combination of evidence highlighted above; however, unfortunately, this is not the case for all the defendants who appear to have worked together to achieve this common goal.

[36] To this end, in order to tie up the first and second defendants' conduct with the third defendant's actions, it is obvious that the law recognises that the right to have the protection of confidentiality is an equitable right, and any infringement thereof can be asserted against a third party, except when the third party is a bona fide party without notice, which is not the case here. (See *Valeo Vision SA v Flexible Lamps Ltd* [1995] RPC 205).

[37] As to whether these acts by the defendants have detrimental effects on the plaintiff, there cannot be a doubt that a party who has obtained confidential information must not use that information as a springboard for activities detrimental to the other party who provided the confidential communication. (See *Seager v Copydex Ltd* [1967] 2 All ER 415).

[38] As such, when it comes to these acts being detrimental to the plaintiff, I find that there are no coincidence circumstances that as soon as the above surrounding events took place, there were certain activities taking place which would not have occurred without the occurrence of the meeting in Amsterdam, which led to the issuance of those emails followed by the Geneva meeting. Consequently, the third defendant's subsidiary was incorporated in Singapore, even though the third defendant had never been present in the Asia Pacific region before.

[39] Resulting from this domino effect, the plaintiff is subjected to far-reaching consequences. In the first instance, Harding Traffic Ltd terminated the plaintiffs distribution rights for the Rotorua Lakes Council project on 13 August 2018 despite having discussed it for months prior to that date, not to mention that Harding Traffic Ltd was able to secure the distributorship for the implementation of the Rotorua Lakes Council through the plaintiff's support and assistance. Upon further analysis, it appears that the documents that were disclosed to the third defendant were an extract from the contract executed by Harding Traffic Ltd and the plaintiff, a price quote provided to Harding Traffic Ltd and a spreadsheet

detailing the plaintiff's performance in Rotorua. To make matters worse, Harding Traffic Ltd awarded this new contract to none other than the third defendant's company. This fact was confirmed by DW2 during cross-examination.

[40] Additionally, I am not able to accept the third defendant's argument that the termination of the plaintiff's equipment was due to Harding Traffic Ltd's lack of confidence in the plaintiff's services. Not only is the evidence hearsay but there is no witness who can testify as to the actual meaning of Harding Traffic Ltd's alleged position in court. Aside from that, it is important to note that all of the facts presented by the plaintiff appear to have negated the defences raised by the third defendant.

[41] This is not the end of it. In October 2018, the Makassar project was awarded to the third defendant despite preliminary work being carried out by the plaintiff. A further indication is that this occurred after the plaintiffs quotations for Indonesian projects had been shared by the first and second defendants with the third defendant. According to further facts, PT Kinarya Terbaik Indonesia signed a memorandum of understanding with the local authority in Makasar, Indonesia. PT Kinarya Terbaik Indonesia turned out to be the customer of the third defendant.

[42] In regard to this Makassar project, I find that the newspaper articles that prove the first defendant was there further enhance the conspiracy theory. It has to do with the third defendant's roles, as I have already mentioned, and their lack of presence in Asia Pacific at that point of time. Further, the court acknowledges the fact that without the thorough assistance of the first and second defendant's and the plaintiff's contacts and goodwill and also the involvement of a person named Rizal, who served as the plaintiff's contact in Makassar and apparently involved in securing the bid for the Makassar project, the third defendant would not be able to secure this project. In this instance, there was no satisfactory rebuttal by the third defendant to the irresistible presumption that what the third defendant got from Makassar and Rotorua was the result of such a conspiracy.

[43] It is evident that the timing of all these events clearly indicates that the complaints, as raised by the plaintiff, were not coincidences. Ultimately, the plaintiff's suffered losses as a result of these incidents. This has also been supported by PWTs detailed testimony. On the basis of the same facts as described above, it has further supplemented the position taken by PW1 that the plaintiff's confidential information was used to secure the above relevant projects.

[44] The above activities, also by no coincidence, resulted in the incorporation of SPS IEM Malaysia Sdn Bhd, whose plans and suggestions were communicated between the defendants through one of the above emails. One cannot run from the fact that, without the plaintiff's material and information, there would have been no activities, as mentioned above, that clearly led to all those carefully designed plans. There is no doubt that IEM Malaysia Sdn Bhd is closely related to the third defendant.

[45] Another observation on the above main issue relates to the third defendant's allegations that the plaintiff has failed to adequately address the conspiracy issue in its pleadings as well as the inadequacy of the evidence provided. The third defendant claims that references to the statement of claim indicate that SPS IEM Malaysia Sdn

Bhd was the vehicle used by the first and second defendants to promote, sell and distribute parking solutions. Furthermore, the statement of claim also claims that the first and second defendants, along with the third defendant, had exploited the plaintiff's confidential information. However, according to the third defendant, this so-called vehicle has no business relationship with the third defendant. As the third defendant points out, based on the pleadings, there is no link per se between SPS IEM Malaysia Sdn Bhd being part of the conspiracy or being used to obtain confidential information.

[46] Following a careful analysis of the main issues and the factual circumstances alluded to therein, as well as reviewing the plaintiff's statement of claim and reply, I conclude that the plaintiff's pleadings have sufficiently established the elements of breach of confidence and breach of conspiracy, amongst others. It appears that there was no deficiency in the pleadings that led to the unwarranted situation of barring the plaintiff from the facts described above, which constitute my substantial findings. The issue of unlawful conspiracy has also been sufficiently identified. A careful reading of the statement of claim would reveal that the entire act complained of is not lawful.

[47] To this end, further analysis revealed that the plaintiff has detailed the allegations of conspiracy quite extensively. Even if the third defendant argues that there are only two brief paragraphs about conspiracy in the statement of claim, reading the statement as a whole will reveal the facts that the plaintiff discovered the disclosure of confidential information to the third defendant after the resignations of the first and second defendants, which occurred in April 2018 before both the first and second defendants left their employment with the plaintiff. Consequently, the facts evolved as described above, where it is apparent from the pleadings that all necessary facts have been specified in detail.

[48] As to the non-incorporation of the SPS IEM as a party herein as argued by the third defendant, I believe it is sufficient to simply include the three defendants who are the central characters in the conspiracy story. When compared with the entire statement of claim, the elements necessary to establish conspiracy are sufficiently established. The testimony of DW2 and the position taken by the third defendant, as discussed above, further support this conclusion.

[49] As for the different entities involved being SPS IEM Malaysia and Singapore as also raised by the third defendant, there is no disputing that the third defendant was the party who obtained confidential information from the plaintiff via the first and second defendants. There can be no escaping the fact that the third defendant is benefiting from all this, while the plaintiff is losing out as a result of it. Based on the above facts, it is always possible to tie up all the entities in Singapore and Malaysia to the third defendant. Furthermore, even at that stage of the trial, there were so many references to these entities without any substantial challenge. Referring to the third defendant's position, it becomes clear that the challenge it made was that the projects were secured on their own efforts.

[50] Furthermore, and as a matter of fact, when it comes to the position of the first and second defendants, even the employment contracts for them defines this as confidential information. According to the employment contracts, the following clause applies:

A

'Confidential Information' means any information (whether in written, oral or any other form, and whether marked CONFIDENTIAL or not) as to the practice, business dealings or affairs of the Company, its Associated or Related Company and/or any of the Company's customers or clients or any of the Associated or Related Company's customers or clients or as to any other matters which may have come to the Employee's knowledge by reason of his employment. Confidential Information shall further include, (a) patent and patent applications, copyrighted works, trade secrets and any other intellectual property right; and (b) information relating to the method, methodology and/or processes of the business(es) of the Company, Associated or Related Companies; and (c) proprietary information, concepts, ideas, techniques, sketches, drawings, works of authorship, inventions, know-how, processes, tools, equipment, algorithms, software programs and formulae; and (d) proposed products and services of the Company or Associated or Related Company, and including, without limitation, the Company's (or its Associated or Related Company's) information concerning research, work, development, projects, design details and specifications, business forecasts, sales and marketing plans, customer or client lists, investors, employees, business and contractual relationships and information the Company (or its Associated or Related Company) provides regarding third parties.

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[51] According to the above clause, there was no doubt that the information passed on to the third defendant by the first and second defendants was clearly private and confidential information that could only be obtained by the first and second defendants in their capacities as the plaintiffs employees and directors, and certainly not the third defendant, who is not only an outsider but also a competitor of the plaintiff.

F

[52] Apart from that, I find that the first and second defendants had no business sharing all those details with the third defendant. In my opinion, no reasonable thinking employees who are not only still employed with their company and subject to the terms and conditions of employment but further subject to certain restrictions on communication with other third parties that survive their termination have the right to disseminate data and information belonging to their former employer.

G

[53] As a result of all these findings, I find that the first and second defendants had not only committed breach of confidence, but also breached their employment contracts. As a result of the above, I further find that the elements of a conspiracy to harm the plaintiff exist involving all defendants. Also, given that these findings exist, the first and second defendants have clearly breached their fiduciary duties.

H

[54] Regarding the position of the second defendant, he argues that the plaintiff alleges that he stopped acting as a director and employee of the plaintiff on 31 August 2018. In contrast, the position taken by the second defendant was that he no longer served as a director after 9 January 2018, which was indicated in his resignation letter. In other words, this clearly indicates that the second defendant no longer served as director after 9 January 2018. Therefore, when the first defendant sent the eight emails to the third defendant, which had been carbon copied to the second defendant, he was no longer a director at the time. Additionally, the second

I

defendant asserts that he should report all his duties to the first defendant. As a result, s 213 of the Companies Act 2016 is not applicable to the second defendant as suggested by the plaintiff. Specifically, s 213 of the Companies Act 2016 identifies a director's statutory duties to exercise his powers in good faith in the interest of the company and for a proper purpose. In this regard, a director would be disqualified from holding directorships if such an offence has been committed.

[55] On this issue, I find that the second defendant resignation from the plaintiff's company was on 31 August 2018, and not 9 January 2018. Firstly, both the plaintiff and the second defendant agreed to this fact in the agreed facts prepared by both parties on 25 October 2021. Second, the resignation letter dated 9 January 2018 did not take effect immediately, but would only take effect once all shares of Cale Holding AB, a Swiss company, had been transferred. As a result of reviewing the above position, I find that the second defendant's position is unfounded. Accordingly, I consider the findings above regarding the third defendant to be equally applicable to the second defendant. Regardless, it appears that on top of that, the second defendant did not object to the dissemination of such information. This means that the second defendant should also be equally responsible. As an employee or as a director of the plaintiff's company, it is the second defendant's duty to act in the plaintiff's best interest at all times.

[56] These findings are best supported by the Court of Appeal decision in *Zaharen bin Hj Zakaria v Redmax Sdn Bhd and other appeals* [2016] 5 MLJ 91; [2016] 7 CLJ 380 on the issue of whether, in addition to owing fiduciary duties to the company as a director, the employee also owed a duty of fidelity to act in the best interests of the company and not to its detriment. On this issue, His Lordship Abang Iskandar JCA (now the President of the Court of Appeal) provided the following analysis:

> [38] At the outset, it must be made clear that as a director of the plaintiff, the second defendant owed a fiduciary duty to the company and the shareholders. Decided cases abound had made the relationship between a director and his company as being trite. As an employee of the plaintiff, the second defendant also had the duty of fidelity towards the company. Basically, that would mean a duty to be loyal to the interest of the company and its shareholders. Both duties presuppose the need to ensure that a director and an employee must act and discharge their responsibilities in a manner that is in the best interest of the company and not act in a manner that may be detrimental to the interest of the company.
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> ...
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> [45] In the context of this case, of course, ordinarily being a subordinate must necessarily mean that the second defendant would have to obey instructions emanating from the first defendant. But the law does not impose absolute duty to obey in all situations.
>
> Only lawful and reasonable directives or instructions must be obeyed by the subordinate. Definitely instructions given which are dubious and plainly unlawful, ought not to be obeyed to the tee, if at all. To do so would in fact make a subordinate an accomplice. The law does not impose such an onerous duty on

an employee in the discharge of his obligations to his employer. As such, with such a duty of fidelity, blind loyalty and subservience to a superior's instructions cannot be condoned. Such a defence could not hold water, much less be sustained, definitely not in the circumstances obtaining in this appeal before us.

[46] But, there was another factor which, to our mind, must weigh heavily against the second defendant. From the undisputed evidence led before the learned HCJ, as was alluded to earlier, the second defendant was also appointed as a director on the plaintiffs board of directors. With that appointment, he had assumed another duty qua the company. That duty is the fiduciary duty owed by all directors to their company. As alluded to earlier in our judgment, that duty obligates a director of a company to act in the best interest of the company. We do not believe that there should be a limited scope to be given to what would constitute a fiduciary duty. Suffice to state here that the baseline threshold must be to see whether the director's impugned conduct has the effect of bringing about adverse and detrimental effects against the interests and well-being of the company. It is akin to a duty thrust upon a trustee.

[57] I must now address the relief sought by the plaintiff. In terms of the plaintiff's relief, particularly the injunction claim, I agree with the third defendant in the sense that I have not seen any evidence that the same information obtained from the plaintiff has been applied in some other countries or projects. The findings made by me, therefore, applies only to the Rotorua Lakes Council and the Makassar projects. It is very difficult for me to determine how and to what extent the third defendant has used the plaintiff's confidential information elsewhere except for the instances before me. Furthermore and apart from the findings involving Rotorua and Makassar's projects, I do acknowledge the third defendant also has some experience in managing this type of business and technology, so it is difficult to assume and predict that they used all of the plaintiff's confidential information carte blanche in all of their projects.

[58] On the issue of the calculation of damages amounting to USD253,321.30 as a result of the termination by Harding Traffic Ltd, I consider PW1 to have adequately addressed this issue in the sense that USD253,321.30 has been calculated by multiplying the number of terminals by the unit price. Accordingly, this is the amount of loss suffered by the plaintiff as a result of the termination of orders made by Harding Traffic Ltd.

[28] Both IEM and Rafizuddin are dissatisfied with the judgment and have respectively on 29 April 2024 lodged Appeal No 740 and Appeal No 741.

FINDINGS OF THIS COURT

[29] We propose to deal with both appeals together.

[30] Towards this end, it is trite that our function is merely that of review. We refer to *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1

(FC), where Zabariah Yusof FCJ held as follows, with emphasis added by us:

> [71] From the aforesaid authorities, there appears to be a difference in approach taken and applied by the UK Supreme Court and the approach taken by the Malaysian courts. Whilst Lord Reed in *Henderson* separated the four non-exhaustive identifiable errors of a trial judge from the plainly wrong
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> *test:*
>
> (a) a material error of law;
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> (b) a critical finding of fact which has no basis in the evidence;
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> (c) demonstrable misunderstanding of relevant evidence; and
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> (d) a demonstrable failure to consider relevant evidence;
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> (all of which justifies appellate intervention of a trial judge's decision), this court in *Gan Yook Chin* effectively included them under what amount to the trial judge as being 'plainly wrong'.
>
> [72] The phrase 'lack of judicial appreciation of evidence' used in *Gan Yook Chin* could very well encompass three out of four errors of a trial judge (other than the 'material error of law') said to be identifiable by Lord Reed in *Henderson*, namely:
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> (a) critical factual finding which has no basis in evidence;
>
> (b) demonstrable misunderstanding of relevant evidence; and
>
> (c) demonstrable failure to consider relevant evidence.
>
> [73] Given that the issue at present is about identifying situations where the findings of fact by a trial court justify appellate intervention, the other identifiable error of 'material error of law' listed by Lord Reed in *Henderson* can occur when a trial judge erroneously applies legal principles (eg rules of evidence) in the course of making a finding of fact, thus resulting in a lack of judicial appreciation of evidence. For example, when a trial judge erroneously places a burden of proof on a party, that will lead the judge to misdirect himself when he attempts to interpret the factual matrix before him. The commission of material error of law by the trial judge in arriving at his conclusions (eg, the requirement of proof of intention in constructive trust as opposed to express trust), also justifies an appellate court reversing such conclusions.
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> [74] Thus, whilst there is a slight difference in approach of appellate intervention, both the UK Supreme Court and our Federal Court effectively share a common thread where it has been held that appellate intervention is justified where there is lack of judicial appreciation of evidence.
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> [75] The Court of Appeal in Singapore applies the plainly wrong test which is similar to our Federal Court, as illustrated in *Damu Jadhao v Paras Nath Singh* [1965] 2 MLJ 151; [1965] CLJU 30; [1965] 1 LNS 30, when it held:
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> The principles under which an appellate court acts when an appellant seeks to displace the conclusion arrived at by a trial judge on questions of fact have been very recently restated by the Privy Council in the case of *Tay Kheng Hong v Heap*

Moh Steamship Co Ltd [1964] 1 MLJ 87; [1964] CLJU 202; [1964] 1 LNS 202 at 153 need only refer to a passage of the judgment of Lord Guest when dealing with the matter, where he states:

> Before the Court of Appeal in Singapore was entitled to reject the trial judge's estimate of the credibility of the appellant and Goh Leh they would have to be satisfied that the trial judge's view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion.
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> This case seems to me to be completely dependent on the trial judge's estimate of the credibility of the appellant and his witnesses and nothing that counsel for the appellant has put forward in his arguments before me has persuaded me that the trial judge's view of the credibility of the witnesses before him was in any way plainly wrong.

[76] What is pertinent is that, the 'plainly wrong' test is not intended to be used by an appellate court as a means to substitute its own decision for that of the trial court on the facts.

[77] It is to be observed that this court in *Tengku Dato' Ibrahim Petra Tengku Indra Petra* had referred to *McGraddie* and *Henderson* and has adopted the *Henderson* approach of the 'plainly wrong' test in determining whether the trial court's findings of fact are reversible upon appeal:

> Recently in *Henderson v Foxworth Investments Ltd and Another* [2014] 1 WLR 2600, the United Kingdom Supreme Court held that in the absence of some other identifiable error, such as a material error of law or the making of a critical factual finding which had not interfered with the factual finding which had no basis in the evidence, an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was 'plainly wrong' in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached, and that if the appellate court was not satisfied that the decision came within that category it was irrelevant that, with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.

[78] Hence following this court's ruling in *Tengku Dato' Ibrahim Petra Tengku Indra Petra* an appellate court should not interfere with the factual findings of a trial judge unless it is satisfied that the decision of the trial judge was 'plainly wrong' where, in arriving at the decision, it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. If the decision did not fall within any of the aforesaid categories, it is irrelevant, even if the appellate court thinks that, with whatever degree of certainty, it would have reached a different conclusion from the trial judge.

[79] The outcome of the present appeal would therefore turn upon whether the findings of the learned trial judge were reasonably made:

> [148] Given the aforesaid, we form the view that rather than adopting a rigid set of rules to demarcate the boundaries of appellate intervention insofar as findings of fact are concerned, the 'plainly wrong' test as espoused in decisions of this

> court should be retained as a flexible guide for appellate courts. As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.

See also *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149; [2012] 1 LNS 1416 (CA) and *China Airlines Ltd v Maltran Air Corp Sdn Bhd (Formerly Known As Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163 (FC).

[31] Before us, IEM and Rafizuddin primarily contended that the learned judicial commissioner fell into error in several crucial aspects.

[32] Firstly, IEM contended that there was no concluded and finalised contract between Flowbird and Harding concerning the Rotorua Lakes Council project in New Zealand. Notwithstanding that, both IEM and Rafizuddin further contended that even if there was a concluded contract, its termination was due to Harding's dissatisfaction with Flowbird's performance. There was, they argued, no contemporaneous proof of IEM using Flowbird's confidential information to secure the Harding contract.

[33] Additionally, they contended that there was no causal nexus between the alleged termination of the contract and the loss and damage purportedly suffered by Flowbird amounting to USD253,321.30.

[34] Secondly, in respect of the Makassar project in Indonesia, IEM and Rafizuddin contended that it was IEM Malaysia, and not IEM, that secured the bid. Moreover, there was no proof that Flowbird had bid for that project; hence, Flowbird could not have suffered any loss or damage.

[35] Thirdly, IEM and Rafizuddin contended that the pleadings of Flowbird in the suit were deficient and defective for failure to plead:

(a) whether the conspiracy was lawful or unlawful;

(b) what and when the agreement between Alain, Rafizuddin, and IEM was;

(c) the purported acts of Alain, Rafizuddin, and IEM arising out of this agreement;

(d) the intention of Alain, Rafizuddin, and IEM to injure Flowbird; and

(e) how the purported acts of Alain, Rafizuddin, and IEM caused harm and losses to Flowbird.

[36] Flowbird refuted these contentions and urged that the judgment was properly reasoned, sound, and correct.

[37] Upon our review, we find that the challenges mounted by IEM and Rafizuddin are predominantly directed against the factual findings accepted by the learned judicial commissioner.

[38] Generally, such findings are unassailable unless they are baseless, misconceived, or misunderstood. Be that as it may, it is trite that the standard of proof for a plaintiff in a claim for conspiracy to injure premised on misuse of confidential information is the civil standard, not the criminal one. In *Khalek bin Awang & Anor v Koperasi Perumahan Kluang Bhd and another appeal* [2021] 5 MLJ 435 (CA), Ravinthran JCA held as follows:

> [34] ... Therefore, the learned High Court judge was not wrong to infer culpability for fraud on the part of the defendants after considering all the circumstances. In the premises, having regard to the prevailing standard of proof which is on a balance of probabilities, in our view, all the strands of circumstantial evidence that was considered by the trial judge were sufficient to find the second and third defendants liable for fraud and conspiracy to defraud on a balance of probabilities.

[39] In respect of IEM's contention that there was no agreement between Flowbird and Harding concerning the Rotorua Lakes Council project, we observed that it is a statement of agreed facts between the parties that Flowbird's services were previously engaged by Harding, which arrangement was subsequently terminated. IEM is plainly bound by its admission made in the statement of agreed facts, pursuant to s 58 of the Evidence Act 1950 and the principle in *Naza Motor Trading Sdn Bhd v Malaysian Motor Insurance Pool (formerly known as HRMIP) (administered by Malaysian National Reinsurance Bhd)* [2011] 2 MLJ 597 (CA) applied.

[40] Be that as it may, having reviewed the relevant contemporaneous correspondence examined by the learned judicial commissioner particularly the emails exchanged between 2018 and 2019, we are satisfied that the emails sent between March and April 2018 involving Flowbird and IEM contained confidential information belonging to Flowbird, while Alain and Rafizuddin were still employed by Flowbird. We are further satisfied, from the correspondence between Flowbird and Harding, that there indeed existed a contractual relationship between them. It was agreed that Flowbird would submit a bid to the Rotorua Lakes Council through Innovative Parking Solutions Ltd ('i-Park'), under which i-Park would operate the car parking system, and Harding would manage the provision of Flowbird's equipment.

The subsequent termination of that contract marked the cessation of Flowbird's services to Harding.

[41] As to whether IEM used Flowbird's confidential information to secure the Harding contract for the Rotorua Lakes Council project, we are satisfied that IEM through the facilitation of Alain and/or Rafizuddin during their meetings and correspondence in March to April 2018 had access to extracts of the agreement between Flowbird and Harding, as well as to price quotations, budgets, and spreadsheets reflecting Flowbird's contractual performance with Harding.

[42] Regarding the termination of Flowbird's contract by Harding via letter dated 13 August 2018, we are of the view that the cause of termination must be ascertained from the totality of the evidence adduced at trial. IEM asserted that the termination was due to Flowbird's unsatisfactory contractual performance, whereas Flowbird contended that IEM had taken advantage of confidential information concerning Harding, disclosed by Alain and/or Rafizuddin, and used such information to its own benefit.

[43] Upon our review, we find that the learned judicial commissioner was not plainly wrong in concluding that it was more probable that IEM succeeded in obtaining the contract from Harding after having knowledge of Flowbird's quotation and discounts offered to Harding. No witness from Harding was called at trial to testify on the reasons for the termination, particularly whether it stemmed from a loss of confidence in Flowbird's performance. While it is noted that Flowbird did not respond in writing to Harding's said letter, we do not consider that omission fatal.

[44] In the circumstances, we find that the learned judicial commissioner was entitled to draw the necessary inferences from the testimonial and documentary evidence adduced. Circumstantial evidence is equally cogent, for it is rare to find direct evidence of a conspiracy of this nature; see *Ho Tack Sien & Ors v Rotta Research Laboratorium SpA & Anor (Registrar of Trade Marks, intervener)* [2015] 4 MLJ 166 and *Khalek bin Awang & Anor v Koperasi Perumahan Kluang Bhd and another appeal*. It is therefore unnecessary for Flowbird to reconstruct with exactitude every event constituting the conspiracy. Based on the analysis and findings in the judgment, we are satisfied that the learned judicial commissioner correctly held that 'it is evident that the timing of all these events clearly indicates that the complaints as raised by the plaintiff were not coincidences. Ultimately, the plaintiff suffered losses as a result of these incidents ...' and made the adverse finding against IEM including on the termination of the Harding contract based on the totality of the evidence produced in court.

[45] We reiterate that the applicable standard of proof is not beyond reasonable doubt, but on a balance of probabilities. Flowbird has sufficiently discharged this burden in establishing a conspiracy to injure premised upon the misuse of confidential information by IEM, Alain, and Rafizuddin. Consequently, we are satisfied that the termination of the Harding contract resulted in loss and damage to Flowbird in relation to the Rotorua Lakes Council project. The requisite elements of the tort, as set out in *Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and another appeal* [2016] 3 MLJ 797; [2016] 3 CLJ 676 (CA) have been met, and we find no basis to conclude that the learned judicial commissioner was plainly wrong.

[46] In respect of the quantum of damages of USD253,321.30 awarded to Flowbird, we note that Flowbird computed this amount by multiplying the number of terminals ordered by Harding against the unit price per terminal, representing the total sales turnover claimed for that contract. IEM and Rafizuddin contended that this figure was inflated, as the costs incurred should have been deducted. The burden lies upon Flowbird to adduce evidence demonstrating the actual loss suffered; see *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 (FC).

[47] Upon our review, we find that Flowbird may only recover its loss of profit arising from the terminated contract; see *Poteck Enterprise Sdn Bhd v Richallenge Corp Sdn Bhd* [2025] 6 MLJ 886; [2025] 5 MLRA 836 (CA). This should be computed as the difference between the sales turnover and the cost of sales. We further note IEM acknowledged that this could at most amount to EUR45,255 (approximately USD51,610) based on Flowbird's own spreadsheet.

[48] Accordingly, we find that the learned judicial commissioner erred in assessing damages at USD253,321.30. The award ought therefore to be varied and reduced to USD51,610.

[49] Turning to the Makassar project, IEM contended that there was no evidence that Flowbird had submitted a bid for the project. It was further asserted that the successful bidder was IEM Malaysia, and not IEM.

[50] Again, upon review, we find that the learned judicial commissioner had carefully analysed the factual matrix leading to the award of the Makassar project. It was found that this project was secured through the assistance of Alain and Rafizuddin, who shared Flowbird's quotations with IEM, and through the involvement of one Rizal, a Flowbird contact in Makassar. We also note that several newspaper articles mentioned Alain's active role in the project, particularly an article dated 24 October 2018, which reported Alain attending

the signing ceremony as part of the IEM team, described as 'MD IEM Singapura'.

[51] We therefore find that the learned judicial commissioner was not plainly wrong in holding that IEM, together with Alain and/or Rafizuddin, conspired to injure Flowbird by misusing its confidential information. The fact that Flowbird did not itself submit a bid for the Makassar project is of no consequence.

[52] As for IEM's contention that the Makassar project was secured by IEM Malaysia and not IEM, we find no error in the learned judicial commissioner's conclusion that IEM Malaysia and IEM Singapore were part of a corporate structure established by IEM in furtherance of the conspiracy to injure Flowbird. The evidence shows that they acted in concert at all material times. Although IEM maintained that IEM Malaysia had secured the contract, the evidence adduced by Flowbird pointed to IEM Malaysia merely bidding for it, with no contrary evidence showing that it executed the contract. This is likely due to IEM Malaysia's dissolution on 14 October 2019. Accordingly, the learned judicial commissioner was not plainly wrong in concluding that the contract was in substance with IEM.

[53] In the premises, we find that the learned judicial commissioner correctly ordered general damages to be assessed, or alternatively, an account to be taken in respect of the Makassar project, arising from the misuse of confidential information, notwithstanding that Flowbird neither bid for nor secured the project.

[54] For completeness, notwithstanding the finding of conspiracy to injure, we are satisfied that the learned judicial commissioner correctly held that Alain and Rafizuddin are separately liable to Flowbird for breach of fiduciary duties as directors, having acted contrary to Flowbird's interests by disclosing its confidential information to IEM between March and April 2018. Rafizuddin, as stated in the agreed facts, only ceased to be a director on 31 August 2018. The case of *Tresenergy Sdn Bhd v Mohd Fauzi bin Ya'akob & Anor* [2021] 7 MLJ 419, relied upon by Rafizuddin, is distinguishable on its facts, as there was no evidence of fiduciary breach therein.

[55] Finally, as regards IEM's contention that Flowbird failed to plead the elements of conspiracy to injure in its statement of claim, we find upon review that the material facts were sufficiently pleaded to support the claim for unlawful conspiracy. IEM was not misled in any way. In any event, IEM could have sought further and better particulars if clarification was required.

[56] There is therefore no merit in the ground of appeal alleging deficiency

in Flowbird's pleadings. The authorities relied upon by IEM, namely *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394; [2010] 5 CLJ 32 (CA) and *Golden Affinity Development Sdn Bhd (in liquidation) v Lim Yok Wah & Ors and another case* [2023] 11 MLJ 581, are distinguishable on their own facts.

CONCLUSION

[57] For the foregoing reasons, we find no merit in both Appeal No 740 and Appeal No 741, save for the award of damages of USD253,321.30 in prayer (2) of the judgment. The appeals are therefore allowed in part by varying the said award of damages to USD51,610. The remainder of the judgment is affirmed.

[58] The parties shall bear their respective costs for both Appeal No 740 and Appeal No 741.

Both appeals allowed in part by varying award of damages to USD51,610; the remainder of High Court's judgment affirmed; parties were ordered to bear their respective costs for both appeals.

Reported by Dzulqarnain Ab Fatar